A

# STRONGKOTA DEVELOPMENT SDN BHD

**v.**

# LEMBAGA LEBUHRAYA MALAYSIA & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
ZAKARIA SAM J
[CIVIL SUIT NO: 22-538-2001]
20 OCTOBER 2011

C

***LAND LAW:*** *Acquisition of land - Compensation - Delay of - Defendants' intended acquisition of plaintiff's land for major road project - Plaintiff's planning permission for development of land rejected - Acquisition of and compensation for land delayed for ten years - Whether plaintiff could sue for loss of use of land and loss of income from intended development - Whether defendants owed plaintiff duty of care not to cause loss - Relationship between parties - Whether damages for loss of interest on compensation award allowable*

D

E

The plaintiff, a developer, purchased 8.5 acres of land ('the land') in Georgetown, Penang, on part of which it intended to construct 148 units of medium-cost apartments ('the project'). Before the land was sold to the plaintiff, its former owner had obtained planning permission for the project from the Penang Municipal Council ('MPPP'). When the plaintiff applied for renewal of the planning permission, MPPP rejected the application on the ground that the land would be affected by the proposed construction of the Penang Outer Ring Road ('PORR'). MPPP's rejection was made on the instructions of the defendants whose decision was to construct the PORR on the land and on whose behalf the land was subsequently acquired. The land was only formally acquired and gazetted for acquisition six years after the plaintiff's said application for renewal of the planning permission was rejected and full compensation for the land was only paid four years after the gazette. Based on the delay in the acquisition, the plaintiff sued the defendants for loss of use of the land and loss of income from sale of the apartments, had they been constructed. The first defendant denied liability for delay as it contended that it was solely the Malaysian Government's decision whether and when to acquire the plaintiff's land for the PORR. Both defendants also submitted that since the land was acquired and compensation for it paid after the suit was filed, the plaintiff no longer had a cause of action against them or, alternatively, was estopped from maintaining its claim.

F

G

H

I

**Held (allowing the plaintiff's claim with costs of RM50,000):**

**(1)** The defendants were involved in the acquisition of the plaintiff's land on behalf of the government and owed the plaintiff a duty of care to ensure that either the land was formally acquired expeditiously or the plaintiff be allowed to develop the land to ensure it did not suffer financial loss as a result of the defendants' action or inaction. (paras 30, 41, 42 44 & 70)

**(2)** The defendants always dealt with the plaintiff *via* correspondence and meetings to address the issues involving the plaintiff's land. There was an assumption of liability to the plaintiff and the relationship between the parties was almost contractual. It gave rise to a responsibility as the plaintiff had acted upon the information and directions of the defendants. (para 70)

**(3)** If not for the PORR project and the second defendant's direction to MPPP, the plaintiff's planning permission would have been approved and the plaintiff would have proceeded with its development work. (para 68)

**(4)** The loss to the plaintiff was forseeable and reasonable because had the plaintiff's land been acquired in 1997, when the planning permission was not extended and it was informed that the revision of alignment of the PORR was no longer possible, the plaintiff would have been compensated for the value of the land and it would have been able to make use of the compensation amount. (para 86)

*[The plaintiff was awarded RM7,693,131 as damages for loss of interest on the compensation award with interest thereon at 8% per annum from date of judgment until full payment.]*

**Case(s) referred to:**

*Anderson & Others v. Merrett Syndicates & Others [1994] 3 All ER 506* ***(refd)***

*Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC* ***(refd)***

*Cahaya Baru Development Bhd v. Lembaga Lebuhraya Malaysia [2010] 8 CLJ 761 FC* ***(refd)***

*Chandra Bansi Singh and Others v. State of Bihar and Others [1984] AIR Supreme Court 1767* ***(refd)***

*Hedley Byrne & Co, Ltd v. Heller & Partners Ltd [1963] 2 All ER 575* ***(refd)***

*National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA* ***(refd)***
*Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC* ***(refd)***
*Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 FC* ***(refd)***
*Pemungut Hasil Tanah, Kuantan v. Oriental Rubber & Palmoil Sdn Bhd [1985] 1 LNS 127 FC* ***(refd)***
*Stansbie v. Troman [1948] 2 KB 48* ***(refd)***
*Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit B Matusin & Ors [1994] 3 CLJ 567 SC* ***(refd)***
*Swinney v. The Chief Constable of the Northumbria Police [1996] CA* ***(refd)***
*Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC* ***(refd)***
*Welsh v. Chief Constable of the Merseyside Police and Another 1 All ER 692* ***(refd)***

**Legislation referred to:**
Highway Authority Malaysia (Incorporation) Act 1980, s. 11
Land Acquisition Act 1960, ss. 4, 8
Town & Country Planning Act 1976, ss. 19, 20, 21(2), 22

*For the plaintiff - Ghazi Ishak (B Jeyasingam & Nicholas Kow with him); M/s Ghazi & Lim*
*For the 1st defendant - Ramesh Sanghvi; M/s Kassim Tadim & Wai & Co*
*For the 2nd defendant - Norhisham Ismail SFC; AG's Chamber*

*Reported by Ashok Kumar*

## JUDGMENT

**Zakaria Sam J:**

### Introduction

**[1]** The plaintiff is a developer.

**[2]** The 1st defendant is a corporate body incorporated under the Highway Authority Malaysia (Incorporation) Act, 1980 (HAMA) and has a statutory obligation under s. 11 of HAMA to supervise and execute the design, construction and maintenance of Highways as determined by the Government of Malaysia. The 1st defendant is also a statutory agency of the Ministry of Public Works Malaysia (Ministry of Works).

**[3]** I & P Development Sdn Bhd (I & P) had on 6 September 1991 obtained permission from Majlis Perbandaran Pulau Pinang (MPPP) to construct 148 units of 4 - 10 storey medium costs apartment on their land, in Section 5, Town of Georgetown Penang in respect of Lot No: 4723 HS (D), 2834, 4724 HS(D), 2835, 4725 HS(D) 2836, 4726 HS (D) 2837, 4727 HS(D) 2838, 4728 HS (D), 2839, 4729 HS (D), 2840, 4730 HS (D), 2841, 4731 HS(D) 2842, 4732 HS(D) 2843, Plot A (PT 21 HS (D) 2866), Lot Lama No: 4757 (PT 22 HS (M) 2867, Lot Lama No 4758 (PT 23 HSD (D) and Lot Lama No: 4759 (PT 24 HS (D) 2869 ('the said land'). A B C

**[4]** However I & P's planning permission had expired on 5 September 1994.

**[5]** Notwithstanding that, I & P entered into a Sales & Purchase Agreement (SPA) with the plaintiff on 6 July 1995 to sell the said land to the plaintiff then with the expired planning permission. D

**[6]** It was I & P that applied to MPPP for renewal of the planning permission and MPPP granted I & P the renewal of the planning permission until 5 September 1995. E

**[7]** The plaintiff proceeded with their plan to develop an area of 5.0786 acres of the said land and the remaining area was to be used for future development, road reserve and open space in accordance with the approved plans by MPPP. F

**[8]** When the planning permission expired on 5 September 1995, the plaintiff on behalf of I & P applied for the extension of the planning permission on 6 September 1995, 25 August 1996 and 8 September 1997 by paying the necessary fees which was accepted by MPPP. However, MPPP rejected the extension of the planning permission by their letter dated 18 October 1997 to I & P on the basis that the property was affected by the proposed construction of Penang Outer Ring Road (PORR). The revision of the alignment was no longer possible as the PORR project was going to effect the said land. G H

**[9]** The plaintiff proceeded to file this civil suit on 22 October 2001 (which was twice amended on 14 September 2007 and 13 January 2009). The reliefs sought under the amended statement of claim are as follows: I

(a) Damages of RM48,736,931.70 from the defendants to be paid (at the sum to be determined by the court).

(b) Aggravated damages.

(c) Interest on the damages at the rate of 8% per annum from 19 May 1997 until full payment, and

(d) Costs.

**[10]** At the point of filing this suit on 22 October 2001, the said land was not formally acquired.

**[11]** The said land was finally acquired under s. 8 of the Land Acquisition Act, 1960 (LAA) for RM20,429,288.04 on 20 November 2003. The increase in compensation of RM18,723,220.48 was finally paid after parties agreed to enter a consent order on 6 August 2007.

### Plaintiff's Case

**[12]** As a consequence of the decision made by the 1st and 2nd defendants to construct the PORR project on the entire portion of the plaintiff's land comprising 8.5 acres, the plaintiff could not proceed with it's development plans as MPPP had refused to renew the planning permission upon the directions by the defendants who were the bodies on whose behalf the said land was subsequently acquired. The defendants did not acquire the plaintiff's 8.5 acres for the PORR project and this led to the plaintiff filing this claim for losses of RM48 million as particularized in amended lampiran A to the re-amended statement of claim:

| | |
|---|---|
| i. Kerugian kehilangan kegunaan tanah seluas 167,884.71 kaki persegi x RM109 sekaki persegi | - RM18,299,433.40 |
| ii. Kerugian pendapatan dari 148 unit kondominium 4 blok 4 - 10 tingkat | - RM8,759,710.00 |
| iii. Kerugian kehilangan kegunaan tanah seluas 198,878.70 sekaki persegi x RM109 sekaki persegi | - RM21,677,778.30 |
| Jumlah | - RM48,736,931.70 |

**[13]** It is the plaintiff's case that both the defendants are in breach of the law as the defendants failed to take any steps on an urgent basis or within a reasonable time to acquire the plaintiff's land that was affected by the PORR project. This had resulted in losses to the plaintiff as the plaintiff was prevented from utilizing the plaintiff's land for it's intended development and neither was it formally acquired and compensation was paid by the defendants.

**[14]** The plaintiff could not proceed with its development plans as it's entire land of 8.5 acres was affected by the PORR project. The acquiring authorities, ie, the 1st and 2nd defendants formally acquired the plaintiff's land by issuing a s. 8 Notice of the LAA, only on 23 October 2003 and which was gazetted on 20 November 2003. Full compensation amount in respect of the acquisition of the said land was paid after a consent judgment was recorded in court on 6 August 2007 (*vide* Penang High Court Land Reference No: 15-6-2005 (the Land Reference).

## 1st Defendant's Case

**[15]** The 1st defendant's case is that the decision as to whether and when to acquire the plaintiff's land is not a decision by the 1st defendant but by the Government of Malaysia.

**[16]** The 1st defendant claimed that initially it was not directed by the Government of Malaysia to take steps to acquire any of the lands affected by the PORR project including the plaintiff's land prior to the proper and formal finalization and execution of a concession agreement between the Government of Malaysia and the Concessionaire appointed by the Government of Malaysia to implement the PORR project.

**[17]** The 1st defendant's contention is that it had taken all reasonable and proper steps which led to the acquisition of the plaintiff's land of 8.5 acres after the decision was made by the Economic Planning Unit, ('EPU'), Prime Minister's Department and as directed by the EPU for the early acquisition of the plaintiff's land.

**[18]** The 1st defendant further claimed that it is not liable to the plaintiff for any delay in the decision made by the Government of Malaysia to acquire the plaintiff's land for the PORR project or for the delay in the finalization of the alignment of the PORR project.

**[19]** It is also the 1st defendant's case that the plaintiff is estopped from proceeding with this claim as it had been compensated when the Land Administrator awarded compensation sum of RM20,424,288 which was later increased in the land reference proceedings pursuant to a consent order for a further sum of RM18,723,220.48.

**[20]** The 1st defendant also contends that the failure of the plaintiff to obtain the extension of the planning permission from MPPP is a matter between the plaintiff and MPPP and that the 1st defendant had made numerous and reasonable attempts to accommodate the plaintiff's request to make adjustments to the alignment for the PORR Project affecting the plaintiff's land and the plaintiff was never precluded from proceeding with it's development project.

## 2nd Defendant's Case

**[21]** The 2nd defendant argued that since this suit was filed in 2001 before the acquisition by the government and since the said land is now acquired and compensation for the sum of RM39,147,508.48 has been paid, the; plaintiff no longer has an existing cause of action against the 2nd defendant.

**[22]** It is also the 2nd defendant's case that the planning permission was granted to I & P and not to the plaintiff and therefore the plaintiff has no *locus standi* to maintain this suit against the 2nd defendant.

**[23]** The 2nd defendant further argued that when the plaintiff and I & P entered into the SPA on 6 July 1995, the planning permission had already expired on 5 September 1994 as evidenced by the preamble to the SPA. The extension from 5 September 1994 to 5 September 1995 was given to I & P and not the plaintiff.

## Findings

**[24]** Plaintiff has led evidence that it suffered losses because of it's inability to continue it's development project and the failure by the defendants to acquire the plaintiff's land promptly. Plaintiff paid the renewal fee for the extension of planning permission of No. 4 and No. 5 on 6 September 1995, 25 August 1996 and 8 September 1997. However, the extension of planning permission

was rejected by a letter dated 18 October 1997 from the MPPP (at p. 65, bundle B) as the 2nd defendant's consultant, ESA Jurutera Perunding Sdn Bhd had informed the plaintiff that the revision of the road alignment affecting the plaintiff's land cannot be revised further unless instructed by the 2nd defendant (at p. 62 bundle B). MPPP acted upon the instructions and directions of the defendants in rejecting the plaintiff's application for the extension of the planning permission.

**[25]** The defendants had revised their plans on many occasions. After the 1st defendant issued a letter dated 10 December 2001 (at p. 625 - 626, bundle D) to the plaintiff informing of the intended acquisition of the 11 lots of land belonging to the plaintiff, the Pejabat Pengarah Tanah dan Galian had on 12 August 2002 decided to withdraw the proposed acquisition and refer the matter again to the 1st defendant (at p. 114, bundle B). The plaintiff had also written letters to various authorities complaining of his predicament (see p. 610, bundle D, ie, letter dated 30 November 2001) where the plaintiff had complained that both the defendants, EPU and the concessionaire company Peninsular Metro Works Sdn Bhd (PMW) have been giving all type of reasons for not acquiring the plaintiff's land. Similar letters were written to the 1st defendant. The plaintiff had even written a letter dated 16 March 2001 to the Prime Minister of Malaysia (see pp. 610 - 612, 615-617, 651 and 654, bundle D).

**[26]** By letter dated 4 March 2001 the Director General of Public Complaints Bureau wrote to the 1st defendant to enquire as to when the 1st defendant proposed to acquire the plaintiff's land and the time frame needed for the acquisition until compensation is paid. The 1st defendant replied informing that the acquisition cannot be done as the concession agreement has not been signed and there is no allocation provided. Plaintiff also wrote letters dated 9 July 2002 and 15 July 2002 (at pp. 667 - 670, bundle D) to the 1st defendant complaining that the final alignment for the project has changed seven times in the last five years.

**[27]** The said land was eventually acquired on 23 October 2003 after a long delay when a s. 8 Notice of the LAA was issued.

**[28]** It is abundantly clear that the 1st defendant is liable to pay damages for the delay in acquiring the plaintiff's land as SD1 himself admitted under cross-examination that:

Q: Saya katakan kelewatan ambil tanah adalah kerana LLM menunggu keputusan UPE dan JKR untuk keputusan pengambilan tanah.

A: Setuju.

**[29]** The 1st defendant is liable to pay damages to the plaintiff as from their own admission they are responsible in the acquisition of the plaintiff's land. In fact both the defendants are liable from 19 May 1997 as the 2nd defendant's consultant had informed the plaintiff that the revision of the PORR alignment is not possible unless upon the 2nd defendant's instruction.

**[30]** The defendants owe the plaintiff a duty of care to ensure that the plaintiff's property which was said to be affected by the PORR project was either formally acquired under the LAA expeditiously or the plaintiff be given liberty to develop them.

**Whether The Defendants Are The Parties Responsible In The Acquisition Of The Said Land And The Party That Has To Be Referred To Before The Extension Of The Planning Permission Can Be Given By The MPPP**

**[31]** The learned counsel for the 1st defendant submitted that the plaintiff has not proven that the 1st defendant is the decision maker or the party responsible to decide whether to acquire the plaintiff's land. The 1st defendant argued that the decision maker is the Government of Malaysia which has not been named as a party to the suit.

**[32]** The counsel further submitted that the statutory duty of the 1st defendant is to execute the decisions as determined by the Government of Malaysia as provided under s. 11 of HAMA. He cited *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725 and *Cahaya Baru Development Bhd v. Lembaga Lebuhraya Malaysia* [2010] 8 CLJ 761 (Rayuan Sivil No: 01-12-2009) which decided that the 1st defendant's statutory powers under HAMA were limited to supervising and executing the design, construction and maintenance of highways as determined by the government. The government was the decision maker and the 1st defendant was merely the supervisor and executor of the decision. It is submitted that the 1st defendant has no decision making powers.

**[33]** He further submitted that s. 8 Notice under the LAA cannot in any way be construed to mean that the 1st defendant is the 'acquiring body' as alleged by the plaintiff. The acquiring authority is the state and the plaintiff's cause of action (if any) is against the State or the Government of Malaysia.

**[34]** However, it must be noted that the state acquired the land on behalf of the defendants to carry out the PORR Project.

**[35]** The facts of the above case as cited by the counsel for the 1st defendant can be distinguished from the present case.

**[36]** The 1st defendant in the instant case was appointed by the 2nd defendant by a letter dated 16 April 1998 (see p. 568 bundle D). Section 4 of HAMA clearly specifies that the composition of the Highway Authority Malaysia (Lembaga Lebuhraya Malaysia) shall consists of six representatives and one of them is the Director-General, Public Works Department Peninsular Malaysia or his representative (the 2nd defendant herein).

**[37]** The 1st defendant was aware of the rejection of the planning permission as the 2nd defendant who was giving directions to MPPP not to renew the planning permission since 19 May 1997 was part and parcel of the composition of the 1st defendant by the involvement of it's Director-General (see pp. 55 and 62, bundle B). The 1st defendant was actively involved in the acquisition of the plaintiff's land when SD1, Md Sani bin Dawa (Pegawai Pengurusan Tanah of the 1st defendant) was present during the enquiry before the Land Administrator.

**[38]** The 1st defendant had also admitted in their statement of defence that they were involved in the land acquisition process in respect of the PORR project.

**[39]** The Parliamentary Secretary in the Prime Minister's Department also confirmed the 1st defendant's role in the acquisition of the plaintiff's land (see p. 187 of bundle B). The 1st defendant had also issued a letter to the plaintiff informing them of the intended acquisition on 10 December 2001 only to be withdrawn later on 12 August 2002 by the Pejabat Pengarah Tanah dan Galian (see pp. 113 and 114 of bundle B).

**[40]** The 1st defendant is a party responsible in the acquisition of the said land and was responsible before the planning permission can be given by MPPP as the Director-General of the

2nd defendant sits and forms part of the composition of the Highway Authority Malaysia which comprises of six persons. The Hansard Report (at pp. 186 and 187 of Bundle B) quoted by the 1st defendant in their submission in fact reinforces the plaintiff's case that the 1st defendant was the party responsible together with the 2nd defendant in determining whether the extension of the planning permission can be issued by the MPPP. Since the acquisition process had to be frozen in order to refer the matter to the 1st defendant again, the 1st defendant's role is vital before the extension of the planning permission can be issued by the MPPP.

**[41]** Pages 106 and 106A of bundle B confirm that the 1st defendant has absolute powers in determining the land involved and alignment in respect of the PORR project and which will ultimately be a factor in determining whether the plaintiff will be granted an extension of the planning permission.

**[42]** Reference must be made to a letter dated 18 May 2007 from the 1st defendant to the State Legal Officer (at p. 801 of bundle E) which gives a very strong indication that the 1st defendant was acting on behalf of the Government of Malaysia in the acquisition of the plaintiff's land. The letter reads as follows:

> Bil.(17)dlm.LLM/UN/5-12Jld. 5
> PU/PP 3081/780 18 Mei 2007
>
> Pejabat Penasihat Undang-Undang Negeri Pulau Pinang
> (State Legal Adviser's Officer)
> Aras 10, Bangunan Persekutuan
> Jalan Anson
> 10400 Pulau Pinang.
>
> (u.p. Y. Bhg Dato Hishawati binti Shariff) No. Faks: 04-2285544
>
> Y Bhg Dato',
>
> Pengambilan Balik Tanah 15-6-2005
> Lot 4723 & 12 Lot Lagi
>
> Strongkota Development Lwn
> Pentadbir Tanah Daerah Timur Laut Pulau Pinang
>
> Dengan segala hormatnya perkara di atas dan surat Y. Bhg Dato' bertarikh 7 Mei 2007 adalah dirujuk.

2. Adalah dimaklumkan bahawa Lembaga Lebuhraya Malaysia (LLM) bagi pihak Kerajaan Malaysia bersetuju dengan keputusan Y Bhg Dato' untuk memberikan pampasan tambahan sebanyak 15% ke atas jumlah sebanyak RM92.00 sekaki persegi (jumlah nilaian oleh JPPH) kepada Tetuan Strongkota Development sebagai penyelesaian luar Mahkamah. Ini menjadikan jumlah pampasan yang akan diterima oleh Tetuan Strongkota Development adalah sebanyak RM105.00 sekaki persegi.

3. Namun begitu untuk makluman Y. Bhg Dato pihak LLM kini masih dalam proses untuk memohon peruntukan daripada Kementerian Kerja Raya bagi tujuan pembayaran pampasan tambahan tersebut. Berdasarkan Akta Pengambilan Tanah 1960, faedah sebanyak 8% akan dikenakan sekiranya pembayaran pampasan tidak dibuat dalam tempoh masa yang ditetapkan. Ini bermakna kerajaan akan menanggung kerugian sekiranya berlaku kelewatan dalam pembayaran pampasan tambahan tersebut. Sehubungan itu adalah diharapkan agar perkara ini berada dalam perhatian Y. Bhg. Dato'.

4. Justeru itu, dengan persetujuan kedua-dua pihak ke atas jumlah yang telah diputuskan di Para 2, pihak Tetuan Strongkota Development akan menarik balik sebarang tuntutan / kes Mahkamah berkenaan kes ini.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t

(NOR KAMAL BIN MD. ISA)
Timbalan Ketua Pengarah (Pengurusan)
b.p. Ketua Pengarah
Lembaga Lebuhraya Malaysia.

Edaran dalaman

- Y Bhg Dato' Ketua Pengarah LLM
- Tuan TKP (Perancangan dan Pembangunan LLM)
- Pengarah Pengurusan Tanah, LLM
- Pengarah Kewangan dan Pentadbiran Am, LLM

**[43]** This letter proves that the 1st defendant's role in this case is not merely as supervisor and executor of the government's decision in respect of the design, construction and maintenance of

highways. The 1st defendant was actively involved in the acquisition of the plaintiff's land on behalf of the Government and even had the power to decide how much compensation to be paid to the plaintiff.

**[44]** The 2nd defendant was involved in the acquisition of the plaintiff's land since 1996 when the 2nd defendant had by letter informed the MPPP that the plaintiff's development would be affected by the final alignment of the PORR project as shown in lampiran A of their letter (see para. 9 at p. 52 of bundle A and p. 55 of bundle B). The said letter at p. 55 was also copied to the plaintiff. The 2nd defendant had admitted to issuing the letter at p. 55 of bundle B in their defence at para. 9, p. 10 of bundle A.

**[45]** I agree with the submission of the learned counsel for the plaintiff that the 2nd defendant is responsible for the acquisition of the said land and the party responsible before the extension of the planning permission can be granted. This is evidenced from the 2nd defendant's letter to MPPP which was also copied to the plaintiff (see p. 55 of bundle B). In fact the 2nd defendant's consultant's reply to the plaintiff's letters (p. 60-62 of bundle B), fully confirms that the 2nd defendant is responsible for the extension of the planning permission. Further, p. 68 of bundle B confirms that the 2nd defendant was responsible for the original layout plan of the PORR project.

**[46]** The letter dated 11 September 2000 from Kementerian Pengangkutan Malaysia addressed to the 2nd defendant (p. 88 of bundle B) directing the 2nd defendant to attend to the acquisition of the said land only shows that the 2nd defendant's role was vital in the extension of the plaintiff's planning permission.

**[47]** From the facts above, it is very clear that the defendants were involved in the acquisition of the plaintiff's land and were the parties responsible before the extension of the planning permission can be approved by the MPPP.

**[48]** Based on these grounds I dismiss the defendants' argument that the defendants are not the party responsible to the acquisition of the plaintiff's land.

**Whether The 1st Defendant Is Under Any Obligation In Law To Take Steps To Acquire The Plaintiff's Land When The PORR Alignment Had Not Been Finalized And When The Concession Agreement For The PORR Project Had Not Been Finalized Between The Government Of Malaysia And The Concession Company**

**[49]** The 1st defendant's submission is that the 1st defendant was under no obligation in law whether under HAMA or LAA to unilaterally take steps to acquire the plaintiff's land that was affected by the PORR project when the PORR alignment had not been finalized and the concession agreement for the PORR project had not been executed between the Government of Malaysia and the proposed concessionaire company, PMW.

**[50]** However, SD1 in his evidence referred to the 1st defendant's letter dated 15 December 2000 to EPU (bundle D p. 589 - 590) wherein the 1st defendant made a proposal to EPU to consider early acquisition of the plaintiff's land under ss. 4 and 8 of LAA although it was the norm for acquisition of land under s. 8 LAA to be carried out only after the concession agreement is signed.

**[51]** This was reiterated in the 1st defendant's letter to the Setiausaha Sulit to the Prime Minister dated 15 December 2000 (bundle B p. 90) that the issue of early acquisition had been referred to the EPU and the Ministry of Works for their decision on the proposed early acquisition. In fact, the defendants should have taken steps earlier to acquire the said land because as it appears from the report prepared by the Public Complaint Bureau (p. 649, bundle B), the real issue relating to the implementation of the PORR project was that the concessionaire company was not able to carry out the project and suggested the Government make another decision which is more practical and it gave four alternatives.

**[52]** The 1st defendant had not acted within the statutory powers in failing to take steps for the early acquisition of the plaintiff's land. It transpired that notwithstanding the fact that the concession agreement was not signed, the plaintiff's land was still acquired by the 1st defendant and this shows that the acquisition of the said land can be proceeded with if only the 1st defendant had acted expeditiously to ensure that the acquisition is finalized by advising the relevant departments. If the 1st defendant was

A going to wait until the concession agreement is finalized and executed, it was never going to happen as it appears now the entire PORR project has been cancelled or postponed indefinitely.

**[53]** The plaintiff should not be penalized for any delay in the
B acquisition through no fault of it.

**Whether The Plaintiff Had Planning Permission Which Was Renewed By MPPP Until 5 September 1995 And Whether The Plaintiff Had Development Plans On The Said Land**

C **[54]** The 2nd defendant submitted that the planning permission issued by MPPP was in the name of I & P which is a different entity from the plaintiff, ie, the planning permission is personal in nature.

D **[55]** This argument is misconceived. Although the planning permission was in the name of I & P, s. 21(2) of the Town & Country Planning Act, 1976 provides for the situation where the applicant is not the owner and the planning permission need not be in the name of the owner.

E **[56]** In this case, it is not disputed that the plaintiff has bought the land from I & P Development Sdn Bhd which already had planning permission to construct 148 units of 4 - 10 stories medium costs apartments. This is the same project which the
F plaintiff bought over to develop. The planning permission was granted for the construction of those units. Section 19 of the Act only mentions that anyone intending to develop their land must apply and obtain planning permission for the proposed development activity. This section does not prohibit a subsequent
G purchaser to develop the same land with existing planning permission although in the name of the previous land owner. Section 19 was enacted to ensure that the project proponents in the course of developing their land adhere to government policies and development plans.

H **[57]** The 2nd defendant's contention that s. 21(2) of the Act is only applicable to fresh application is misconceived. There is no provision in the said s. 21 which prohibits the subsequent purchaser of the land from using the existing planning permission.

I **[58]** The defendants' contention that the planning permission was not issued in the name of the plaintiff was never challenged or pleaded in their statement of defence.

**[59]** The 2nd defendant's contention that the plaintiff bought the land from I & P with the expired planning permission is no longer relevant in light of the letter dated 3 August 1995 from MPPP (at p. 52 of bundle B) granting the extension of planning permission until 5 September 1995.

**[60]** The evidence that Lim & Associates the Architect for I & P Development continued paying the extension fee on behalf of the plaintiff was never challenged by the defendants and therefore ought to be accepted. In fact, in the 2nd defendant's own letter (at p. 55 of bundle B) informing that the plaintiff's land was affected by the PORR project was copied to the plaintiff. The 2nd defendant must have recognized the plaintiff as the proper applicant for the planning permission as otherwise it would not have copied the letter to the plaintiff.

**[61]** In this case, the plaintiff was intending on carrying out the same development work for which the planning permission was earlier given to I & P Development Sdn Bhd under ss. 20 and 22 of the Town and Country Planning Act. Therefore, I am satisfied that the plaintiff bought the land with planning permission which was renewed by MPPP until 5 September 1995 and the plaintiff had development plans on the said land as seen in pp. 451 to 480, bundle C especially at pp. 286, 548 and 550.

**Whether The Delay In The Acquisition Of The Plaintiff's Land Was Caused By The PORR Project And Whether The Failure By The Plaintiff To Obtain The Extension On The Planning Permission In Respect Of It's Development Plan Was Due To The PORR Project**

**[62]** It is the 2nd defendant's case that SP1 knew that the qualified title issued in respect of the said land belonging to the plaintiff provided for road reserve outside the said land and the fact that I & P had problems developing the said land because of the proposed road affecting the said land.

**[63]** The original plans showed the road reserve outside the said land. All 14 titles of the said land are 1st grade titles and the plaintiff had provided for the road reserve requirement by surrendering the area marked in orange (at p. 547 of bundle C) when it purchased the property from I & P. That was the original layout plan. The area marked in green is for open space and the

area marked in blue is the plaintiff's intended development. The total area surrendered by the plaintiff was 3.82 acres. However, the defendants altered the alignment on numerous occasions and finally resulting in the acquisition of the entire land. The final alignment of the PORR project which led to the acquisition of the plaintiff's entire land was a far contrast from the original layout plan.

**[64]** The 2nd defendant is relying on the letter dated 19 May 1997 (at p. 61 of bundle B) to establish that it was the plaintiff who had requested the change in the alignment of the road and thereby failing to obtain the planning permission. It will be noted that at the time when the letter was written on 19 May 1997, the plaintiff has complained to the 2nd defendant who had changed the alignment three times. The plaintiff complained that it's project is being stalled and delayed as JKR Wilayah Persekutuan was still considering the alignment. In any event, the 2nd defendant's consultant had informed the plaintiff by letter that it was no longer possible unless instructed by the 2nd defendant. This letter had put an end to any suggestion that the plaintiff had delayed the matter. It also establishes that the plaintiff's failure in obtaining an extension on the planning permission was due to the PORR project and the entire said land was finally acquired and the issue of allowing the plaintiff to develop part of it's land no longer arose. The alleged delay on the part of the plaintiff as claimed by the 2nd defendant was never a reason in the report prepared by the Public Complaints Bureau (at p. 644, bundle D).

**Whether The Acquisition Of The Said Land For The PORR Project Was Done Within A Reasonable Time**

**[65]** As at the date of filing the writ summons on 22 October 2001, the said land was yet to be acquired.

**[66]** There was no evidence of any interference by the plaintiff or the plaintiff being the cause of the delay. In fact the Public Complaints Bureau in its report to Pejabat Perdana Menteri (especially at p. 649 of bundle D) had come to a finding that the concessionaire company was not able to carry out the project and suggested that the government make another decision which is more practical and provided alternative, ie,:

(a) That the government attend to the acquisition earlier for all lands affected by PORR and pay compensation;

(b) To cancel the PORR project and allow the plaintiff to develop its land;

(c) To change the alignment of the PORR out of the plaintiff's land although this will cost more; and

(d) The project be undertaken by the government fully without privatizing the project.

**[67]** From the evidence it was showed that the targeted commencement date for the PORR project was 2003 and the targeted completion date was 3 1/2 year later ie, mid 2006 (see p. 80 of bundle B). However, as on 10 October 2002, (see the Hansard at p. 187 of bundle B) the terms and conditions of the privatization agreement was yet to be finalized.

**[68]** The oases relied on by the 1st defendant: *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Ong Gaik Kee* [1983] 1 LNS 14, *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Kam Gin Paik & Ors* [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 and *Pemungut Hasil Tanah, Kuantan v. Oriental Rubber & Palmoil Sdn Bhd* [1985] 1 LNS 127 can be distinguished. All those cases was in respect of the delay in holding the inquiry of the assessment of damages after the gazette notification. In the instant case, the said land was not gazetted for six years after the planning permission was not extended. Planning permission was not renewed from 19 May 1997 and the said land was gazetted for acquisition on 23 October 2003 and the entire acquisition process culminated in a consent order being entered between the parties on 6 August 2007. If not for the PORR project and the direction by the 2nd defendant to MPPP, the plaintiff's planning permission would have been approved and the plaintiff could have proceeded with it's development work.

**[69]** I therefore agree with the plaintiff's submission that the acquisition was not done within a reasonable time. In my opinion the above facts in fact, lends support to the plaintiff's claim about the delay in making decision on the acquisition. The issues raised by the defendant is an internal problem of the 1st and 2nd defendants and the relevant government agencies. The plaintiff should not be made to suffer for this.

**Whether The Plaintiff Has Suffered Losses And Whether The Plaintiff Is Entitled To Claim Damages In The Sum Of RM48,736,931.70 As Claimed In The Amended Writ Of Summons Dated 14 October 2008**

**[70]** The defendants were always dealing with the plaintiff specifically by correspondence and conducting various meetings to address the issues involving the plaintiff's land which was affected by the PORR Project. SP1 had attended meetings with the defendants and the relevant Government agencies on many occasions and it is therefore incumbent on the defendants that since there is an assumption of liability to the plaintiff which relationship between the parties amounts to almost contractual. The defendants conduct in issuing correspondence and holding various meetings all give rise to a responsibility as the plaintiff had acted upon the information and directions by the defendants in not renewing the planning permission and at the same time informing the plaintiff that the said land was going to be acquired for the PORR Project. The defendants had created a duty of care towards the plaintiff when attending to all the correspondence and meetings with the plaintiff to ensure that the plaintiff does not suffer financial loss as a result of the defendants action or inaction. Lord Devlin in the decision of the House of Lords in *Hedley Byrne & Co, Ltd v. Heller & Partners Ltd* [1963] 2 All ER 575 @ 610 & 611; [1964] AC 465 @ 529 said:

> I do not understand any of Your Lordships to hold that it is a responsibility imposed by law upon certain type of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of Solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.

**[71]** Further, Lord Goff added in *Anderson & Others v. Merrett Syndicates & Others* [1994] 3 All ER 506:

> From this statements, and from their application in Hedley Byrne, we can derive some understanding of the breadth of the specific type to a particular transaction and which may or may not be contractual in nature. All of their Lordships talk in terms of one party having assumed or undertaken a responsibility towards the other.

**[72]** From the facts, it is clear that the defendant could reasonably foresee that the instructions to MPPP not to renew the plaintiff's application of it's planning permission and in delaying the formal acquisition of the plaintiff's land, the plaintiff will suffer losses. In the article *Voluntary Assumption of Tort Liability in English Law: A Paradox by Stathis Bankas (Barcelona, October 2009)* (www.indret.com), it was said that:

> Although the parameters of the formation of a valid Contract are reasonably wide, restrictions imposed in a legal system on liability in Tort (ie, limitation of claims in time, narrowly defined vicarious liability and heads and size of damages) may not allow the fair treatment of claims arising out of direct dealings between the parties, in situations in which a valid Contract cannot be inferred, the generous conditions of formation of Contracts, recognized by the legal system, notwithstanding (this is the case, for example, in German law). Finally, assumption of liability may be used as a basis of extra-contractual liability in order to provide a means of limitation of liability for difficult types of negligent harm. Indeed, the idea of assumption of responsibility as the basis of extra-contractual liability first came into existence in English law in connection with claims for the compensation of types of non-intentional harm other than physical personal injury, notably, psychological and psychiatric harm, nervous shock and pure economic loss.

**[73]** The defendants have assumed a responsibility toward the plaintiff and must therefore ensure that the plaintiff did not suffer any loss as a result of their action.

**[74]** It is my finding that based on the reasons above, the defendants failed to acquire the plaintiff's land formally within a reasonable time and as a result the of which the plaintiff suffered losses.

**[75]** On the issue of damages the plaintiff sought the following reliefs:

(a) Damages for a sum of RM48,736,931.70, from the defendants to be paid at a sum to be decided by this court;

(b) Exemplary damages;

(c) Interest on the damages at the rate of 8% per annum from 19 May 1997 until full payment; and

(d) Costs, and such other reliefs deemed fit by this Honourable Court.

**[76]** The particulars of the damages sought are set out in part (1), (2) and (3) under Annexure A of the plaintiff's claim which includes the loss of use of land and loss of income from the intended development of the said land. It is not disputed that when the plaintiff's claim was filed on 22 October 2001 the said land was yet to be acquired. By the time when this matter was tried in court the land was already acquired.

**[77]** However, during the trial SP1 testified that the plaintiff suffered a loss of RM40,704,523.12 particularized as follows:

(i) Interest claim of RM31,446,992.73. The plaintiff contended that the 8.41 acres of land had been valued by Raine & Horne International in 1996 at RM109 psf and which amounts to RM39,931,016.40. However, the plaintiff submitted that it is prepared to accept a valuation of RM105 psf for the said land which is the sum agreed by the parties in the consent order dated 6 August 2007 when the said land was formally acquired by the State. Therefore, based on this valuation of RM105 psf as per the consent order the total value of the land would be RM38,465,658. (Area of land: 8.41 acres x 43560 x RM105 psf = RM38,465,658). The plaintiff is now claiming interest at 8% per annum from 19 May 1997 to 6 August 2007 on this amount which works out to RM31,446,992.73;

(ii) Loss of income of RM8,759,710. The plaintiff could not proceed with the development project to build the 148 units of apartments as the planning permission that was earlier granted by MPPP was not extended due to the PORR project. SP2, the quantity surveyor gave evidence on behalf of the plaintiff that the plaintiff suffered a loss of RM8,759,710 being loss of income from the sale of the 148 units of condominiums. SP2 gave evidence based on the costs estimate and report prepared by him at pp. 420 to 480 in ikatan C.

**[78]** The 1st defendant submitted that the plaintiff's claim is baseless as the Raine & Horne's Valuation Report is incomplete and does not contain any credible basis as to how this value arrived at RM109 psf in 1996 as there are no comparables. The

2nd defendant also argued that in the absence of proper and reliable valuation report, the plaintiff's claim ought to be disregarded.

**[79]** It is my finding, that apart from criticizing Raine & Horne's Valuation Report, the 1st defendant failed to produce any other valuation report to counter the report from Raine & Horne.

**[80]** The 1st defendant's contention that SP2 is not an expert is misconceived and cannot be accepted as the defendants had never challenged SP2's capacity as a chartered surveyor. The defendants further failed to challenge or dispute SP2's qualifications. The defendants also failed to produce any witnesses to counter the report prepared by SP2.

**[81]** There was no requirement for SP2 to produce his curriculum vitae as his capacity as a qualified chartered surveyor was never challenged.

**[82]** SP2's report is the only report before this court. It is not open for the defendants to now say that there was no basis for SP2 to arrive at his conclusion on the plaintiff's anticipated return. The defendants should have prepared a counter report to challenge the plaintiff's claim on the anticipated returns.

**[83]** SP2's reports had showed the necessary comparables and have provided sufficient information in his report. The defendants were given this report sometime ago.

**[84]** From the facts, it is my finding that the defendants could reasonably foresee that by their actions in delaying the formal acquisition of the plaintiff's land, the plaintiff would have suffered losses. In fact, as at the date of filing the writ on 22 October 2001 the land was yet to be acquired. It is therefore fair, just and reasonable that the plaintiff be given a remedy to seek damages against the defendants.

**[85]** The plaintiff submitted that the sum of 8% is reasonable as the plaintiff's witness, SP1 testified that he had to pay loans with interest at 12.8% p.a. payable every month.

**[86]** On the damages I am willing to accept the valuation of RM105 psf based on the consent order recorded by parties on 6 August 2007 as a fair value, as the delay of ten years (from 19 May 1997 to 6 August 2007) in acquiring the land and

payment of full compensation in respect of the value of the land is a loss foreseeable by the defendants and reasonable because had the plaintiff's land been acquired in 1997 when the planning permission was not extended and when the plaintiff was informed that the revision of the alignment was no longer possible, the plaintiff should have been compensated for the value of his land and it would be able to make use of the compensation amount.

**[87]** I also find that the plaintiff is entitled to claim interest on the value of the land. In *Chandra Bansi Singh and Others v. State of Bihar and Others* [1984] AIR Supreme Court 1767 the court decided that "the appellants should get an equitable compensation in the form of interest calculated at the rate of 7 1/2 percent per annum for two years on the value of the land owned by each Landowner". The fact in *Chandra Bansi Singh*'s case is basically the issue of delay from the date of notification and taking over possession of land.

**[88]** The defendants here also had never challenged the plaintiff's claim for interest charged on the value of the land. The plaintiff has led evidence through SP1 which the defendants failed to challenge or refute on the interest charges paid by the plaintiff to the chargee bank or the expenses or losses incurred during this period of ten years. The plaintiff's evidence must therefore be accepted - see *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit B Matusin & Ors* [1994] 3 CLJ 567 and *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681.

**[89]** After hearing the submissions and going through the evidence damages is allowed in the sum of RM7,693,131. This sum is arrived at in the following manner ie, 8.41 acres x 43560 x RM105 psf = RM38,465,658 x 2% x 10 years = RM7,693,131. I arrived at the interest rate of 2% because this is the rate which is normally paid for money deposited in court in respect of land acquisition matters. There is also a provision of 8% for late payment charges in respect of the delay in the payment of compensation awarded under s. 32 of the LAA but I am awarding 2% interest on the value of the land as it would be a fair amount on the basis that if the land has been acquired in 1997 and the compensation amount deposited in court, the plaintiff would have been entitled to interest at 2% on the amount deposited in court.

**[90]** The authority cited by the 2nd defendant in *Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329 as proposition to say pure economic loss is not allowed in Malaysia must be confined to the facts of that case. In that case, a public road was converted into a temporary occupational license (TOL) and the relevant provisions of the National Land Code were applicable. Abdul Aziz Mohamad, FCJ also held that the TOL could not be a statutory defence to the claim in public nuisance because the issuance of the TOL over the public road was not authorized by Parliament and the closure of the public road was not the inevitable result of the issuance of the TOL. The issue in that case was public nuisance. The court decided in that case that ss. 12 and 46 of the Street Drainage and Building Act, 1974 show that it precludes any construction that any breach thereof would result in a party being able to claim financial loss arising there from.

**[91]** The facts in this instant case are not so much on the breach of it's statutory duty by the defendants but on the assumption of responsibility by the defendants to the plaintiff leading to liability for damages as a result of the defendants' delay in formally acquiring the plaintiff's land. Lord Goff in *Stansbie v. Troman* [1948] 2 KB 48 commented that "such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier". In the case of *Welsh v. Chief Constable of the Merseyside Police and Another* [1993] 1 All ER 692 *and Swinney v. The Chief Constable of the Northumbria Police* [1996] CA, it was held that where the prosecution or police service had given an undertaking to take some action, it could owe and affirmative duty to take reasonable care to honour the undertaking. This assumption of responsibility can be implied in the present case when meetings were held between the plaintiff and defendants and correspondence exchanged assuring the plaintiff that the land was going to be formally acquired only to be delayed much later.

**[92]** On the defendants argument that the plaintiff no longer has an existing cause of action against them as the plaintiff had been compensated for the sum of RM39,147,508.48, my answer is this. I have considered the fact that compensation of the value of the land was made pursuant to consent order dated 6 August 2007

in the Land Reference Proceedings *vide* Penang High Court Suit No: 15-6-2005. However, this civil suit (which was filed in 2001) was already in existence at the time the land reference proceedings was filed and from the consent order of the land reference proceedings, it is noted that there was no reference to a settlement which involved this existing civil suit. In short, there was no global settlement of this civil suit and the land reference proceedings as claimed by the defendants. SD1 also admitted that the compensation amount paid under the consent order was only in respect of the value of the land and not in respect of the damages sought in this civil suit.

## Conclusion

**[93]** For the reasons stated above, I found that the plaintiff had on the balance of probabilities proved their case against the defendants. The defendants are equally liable. I allowed the claim as follows:

(a) (i) Damages in the sum of RM7,693,131 for loss of interests at 2% p.a. on the land area of 8.41 acres at RM105 per sq foot (ie, the amount agreed by parties in the consent order in the land reference proceeding at the High Court Penang No: 15-6-2005) from 19 May 1997 and 6 August 2007 ie, ten years in the following manner: 8.41 acres x 43,560 x RM105 p.s.f.s = RM38,465,658.00 x 2% x 10 years = RM7,693,131.

(ii) The damages of RM8,759,710 for loss of income from the 148 units of apartment is disallowed. To allow this claim would amount to a duplicity in this damages.

(b) Claim for exemplary damages is disallowed.

(c) Interest at 8% p.a. on the judgment sum of RM7,693,131 from the date of judgment until full payment.

(d) Costs RM50,000